No. 14-114

IN THE
Supreme Court of the United States

DAVID KING, *ET AL.*,

Petitioners,

V.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 36B of the Internal Revenue Code, which was enacted as part of the Patient Protection and Affordable Care Act ("ACA"), authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an "Exchange established by the State under section 1311" of the ACA.

The question presented is whether the Internal Revenue Service ("IRS") may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA.

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INTEREST OF JUDICIAL WATCH, INC.[1]

Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit, educational organization that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly monitors significant developments in the court systems and the law, pursues public interest litigation, and files *amicus curiae* briefs on issues of public concern. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

Having an interest in promoting the rule of law, Judicial Watch is concerned that the IRS's expansion of Section 36B of the ACA to authorize the availability of refundable tax credits beyond the clear and unambiguous language of the statute disrupts the deliberate balance of powers intended by the Framers. In addition, Judicial Watch seeks to highlight a recent case decided by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

In *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013) ("*Aiken County*"), the D.C. Circuit addressed the importance of the constitutional system of sepa-

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amicus Curiae* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting the parties' consent have been filed with the Clerk.

ration of powers. Yet, to date, neither the parties nor the other *amici curiae* have applied *Aiken County* to the facts in this case. Nor have they addressed the significant questions concerning the Executive Branch's authority to disregard clear and unambiguous laws passed by the Legislative Branch.

In light of *Aiken County*, it is clear that the issue before this Court is of great importance because it unquestionably implicates the scope of the Executive Branch's authority. Specifically, Petitioners request that the Court reaffirm the basic principle that the Executive Branch cannot disregard federal statutes in favor of its own policy choices and reverse the ruling of the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit"). If the ruling were to stand, the constitutional system of separation of powers would be significantly altered.

SUMMARY OF THE ARGUMENT

The plain language of Section 36B of the ACA is clear and unambiguous. Congress made an unequivocal policy decision to provide refundable tax credits to individuals who purchase health insurance coverage through an Exchange established by one of the states. Yet the Executive Branch interpreted Section 36B to authorize the receipt of refundable tax credits to individuals who purchase health insurance coverage through an Exchange established by the federal government. Because the text of the statute is clear, the interpretation of the IRS is not entitled to deference. Even if it were entitled to deference, the IRS's interpretation does not harmo-

nize with the clear purpose of Congress. Because the IRS's interpretation is contrary to the plain language and the express purpose of the statute, Section 36B must be applied as written. The Fourth Circuit's ruling should be reversed.

ARGUMENT

I. The D.C. Circuit's Ruling in *Aiken County* Is Highly Probative.

In *Aiken County*, a case that "raise[d] significant questions about the scope of the Executive's authority to disregard federal statutes," the D.C. Circuit declared that "[u]nder Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute." 725 F.3d at 257, 259. At issue in *Aiken County* was a petition for a writ of mandamus that sought to compel the Nuclear Regulatory Commission to adhere to a statutory deadline for completing the licensing process for approving or disapproving an application to store nuclear waste at Yucca Mountain in Nevada. As the Court explained,

> [i]f the President has a constitutional objection to a statutory mandate the President may decline to follow the law unless and until a final Court order dictates otherwise. But the President may not decline to follow a statutory mandate simply because of policy objec-

> tions. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates. These basic constitutional privileges apply to the President and subordinate executive agencies.

In re Aiken County, 725 F.3d at 259. In granting the petition, the D.C. Circuit concluded:

> It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by the Nuclear Regulatory Commission. Our decision today rests on the constitutional authority of Congress and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here.

Id. at 267.

The same is true here. There are no constitutional concerns with limiting the receipt of refundable tax credits only to individuals who purchase health insurance coverage through an Exchange

established by one of the states. The Executive Branch simply seeks to replace Congress' policy choice about who is eligible to receive refundable tax credits with its own. As will be addressed below, the plain language and express purpose of Section 36B make clear Congress' policy choice. The Constitutional authority of Congress – as well as the respect that the Executive and Judicial Branches owe to Congress – demands that Congress' policy choice prevails. Section 36B should be applied as written.

II. Both the Plain Language and the Congressional Purpose of Section 36B Are Clear and Unambiguous.

In considering the legality of an agency action, a court must measure an agency's action against the statutory directive. "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986). In addition, if an agency has exceeded a statute's clear and unambiguous boundaries, the agency's interpretation is unlawful. *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011).

"Congress speaks through the laws it enacts" (*Aiken County*, 725 F.3d at 260) and the text of Section 36B is clear and unambiguous. Section 36B plainly states that only an individual who purchases health insurance coverage "through an Exchange established by the State under section 1311 of the

[ACA]" is eligible to receive refundable tax credits. 26 U.S.C. § 36B(c)(2)(A)(i). It is without question that Congress intended for ***only*** individuals who purchase health insurance coverage through an Exchange established by one of the states to be eligible to receive refundable tax credits. Yet, the IRS interpreted Section 36B more broadly. It has authorized the receipt of refundable tax credits also to individuals who purchase health insurance coverage through an Exchange established by the federal government. By expanding the availability of refundable tax credits beyond its statutory authority, the IRS "fail[ed] to respect the unambiguous textual limitations" of Section 36B. *Fin. Planning Ass'n v. Sec. and Exch. Comm'n*, 482 F.3d 481, 490 (D.C. Cir. 2007).

The IRS's interpretation also is not entitled to *Chevron* deference. Where, as here, Congress has "unambiguously expressed [its] intent" through the plain language of a statute, no deference is afforded to an agency. *Chevron U.S.A. Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Dimension Fin. Corp*, 474 U.S. at 368 ("[T]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress"). To determine whether Congress' intent is clear, courts employ the traditional tools of statutory construction. *Silva-Hernandez v. U.S Bureau of Citizenship & Immigration Servs.*, 701 F.3d 356, 361 (11th Cir. 2012). Courts must "begin by examining the text of the statute to determine whether its meaning is clear." *Harry v. Marchant*, 291 F.3d 767, 770 (11th Cir.

2002). They must also "presume that Congress said what it meant and meant what it said." *Id.* The plain language of Section 36B is clear and unambiguous. Section 36B must be applied as written.

Even if the IRS's interpretation were entitled to *Chevron* deference – which it is not because Section 36B is clear and unambiguous – the IRS has impermissibly authorized an extension to the law which does not harmonize with the clear purpose of Congress. *See Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (noting that a permissible agency interpretation of the statute is one that "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent"); *Meriden Trust and Safe Deposit Co. v. Fed. Deposit Ins. Corp.*, 62 F.3d 449, 453 (2d Cir. 1995) (stating that an agency's interpretation of a statute will be reversed "if it appears from the statute or its legislative history that the [agency's] interpretation is contrary to Congress' intent").

When it enacted Section 36B, Congress made a deliberate policy choice to provide refundable tax credits only to individuals who purchase health insurance coverage through an Exchange established by one of the states. Congress heard extensive testimony criticizing a healthcare system operated by the federal government. Also because Congress generally cannot require states to implement federal laws (*Printz v. United States*, 521 U.S. 898 (1997)), its policy decision to provide refundable tax credits ***only*** to individuals who purchase health insurance coverage through an Exchange established by one of

the states was Congress' attempt to *strongly* encourage states to establish Exchanges. Therefore, Congress chose not to create a nationalized healthcare system. Instead, it chose for the federal government to establish an Exchange only if a state failed to do so. Authorizing the receipt of refundable tax credits to individuals who purchase health insurance through an Exchange established by the federal government would not incentivize the states to create Exchanges. It may even encourage some of the States not to create an Exchange. The IRS Rule therefore directly contradicts Congress' policy choice.

Similarly, an agency's interpretation must be based on a permissible construction of the statute. Courts therefore must determine whether an agency's interpretation is "manifestly contrary to the statute." *See Chevron*, 467 U.S. at 843-44; *see also Mayo Found. For Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011) (finding that deference to the agency's interpretation was appropriate because the statute did not speak with "the precision necessary" to definitively answer the question and the agency's interpretation was not "manifestly contrary to the statute"). Unlike the statute in *Mayo*, Section 36B provides all of the information needed to definitively answer the question of who is eligible to receive refundable tax credits. It specifically authorizes the receipt of refundable tax credits to individuals who purchase health insurance coverage through "Exchanges established by the State." 26 U.S.C. § 36B(c)(2)(A)(i). The federal government is not a state, and an Exchange established by the federal

government is not an Exchange established by a state. Congress spoke with "the precision necessary" to leave no doubt what it sought to accomplish, so any extension by the IRS is a contradictory interpretation and is in excess of its authority. *Chevron*, 467 U.S. at 843-44.

CONCLUSION

The plain language of Section 36B is clear and unambiguous. Congress made an unequivocal policy decision to provide refundable tax credits to individuals who purchase health insurance coverage through an Exchange established by one of the states. The IRS impermissibly interpreted Section 36B to authorize the receipt of refundable tax credits to individuals who purchase health insurance coverage through an Exchange established by the federal government. Because the IRS Rule is contrary to the plain language and the express purpose of Section 36B, it is "in excess of statutory jurisdiction, authority, or limitations," is contrary to its "constitutional right, power, [or] privilege," and is "not in accordance with law." 5 U.S.C. § 706(2)(A), (B), and (C). For the foregoing reasons, Judicial Watch respectfully requests that this Court reaffirm the basic principle that the Executive Branch cannot disregard federal statutes in favor of its own policy choices and reverse the Fourth Circuit's ruling.

Respectfully submitted,

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